

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

FILED
02/03/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
40K-0706-R-2022
White, Eugene
5.00

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
WHITEWATER CREEK - BASIN (40K)
PRELIMINARY DECREE

CLAIMANT: USA (Dept. of Interior Bureau of Land Mgmt.)

CASE 40K-0706-R-2022
40K 73329-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claim 40K 73329-00 appeared in the Preliminary Decree for the Lower Missouri River Division, Whitewater Creek. The claim received issue remarks from the DNRC. The claim was consolidated into Case 40K-0706-R-2022 to resolve the issue remarks.

FINDINGS OF FACT

1. Claim 40K 73329-00 received the following issue remark from the DNRC:
THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 2.76 TIMES THE CAPACITY OF THE RESERVOIR.
2. On May 9, 2022, the Court set a filing deadline requiring the Claimants to work with the DNRC under §85-2-248(5), MCA to address the issue remarks on the claims.
3. On August 18, 2022, DNRC Water Resources Specialist Pam Weinmeister filed her *Memorandum* in this matter. Ms. Weinmeister's *Memo* states that she was contacted by Melissa Norris on May 26, 2022, on behalf of the United States Bureau of Land Management ("BLM"). In her *Memo*, Ms. Weinmeister states that Ms. Norris submitted a Project Completion Report regarding the reservoir in question. Ms. Weinmeister further states that BLM filed a *Verified Motion to Amend Water Right Claim* on August 15, 2022. The *Memo* notes that if the modification to the reservoir record contained in the *Motion to Amend* are implemented by the Court, the DNRC recommends the removal of the issue remark.
4. The modifications requested in the *Motion to Amend* and discussed in the *Memo* are as follows:
Dam Height: 18 feet
Depth: 15 feet
Surface Area: 2.94 acres
Capacity: 22.05 acre-feet
5. Claim 40K-73329-00 also received notice-type issue remarks during the DNRC's claims reexamination. No objections were filed.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.
2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.
3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.
4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).
5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.
6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.
7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

CONCLUSIONS OF LAW

1. The evidence in the record is sufficient to resolve the issue remark placed on the above-captioned claim.
2. The additional information and subsequent recommendations provided in Ms. Weinmeister’s *Memo* resolve the volume issue remark appearing on the claim. The reservoir record for claim 40K 73329-00 should be modified as described in Finding of Fact No. 4, and the issue remark should be removed from the claim.

3. The notice-type issue remarks appearing on claim 40K 73329-00 served their notice purpose and should be removed from the claim.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service Via Electronic Mail:

Mark Widerschein,
NRS-ENRD US DOJ
PO Box 7611
Washington, DC 20044-7611
202-532-5803
Mark.Widerschein@Usdoj.Gov
Montanabasins.ENRD@USDOJ.GOV

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K**

Water Right Number: 40K 73329-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
BILLINGS, MT 59101 4669

Priority Date: JUNE 10, 1936

Type of Historical Right: USE

Purpose (use): WILDLIFE

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS
ONSTREAM RESERVOIR.

Volume: 21.46 AC-FT

Source Name: UNNAMED TRIBUTARY OF PEA LAKE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENENE	25	37N	30E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SENENE	25	37N	30E	PHILLIPS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 18.00 FEET

Depth: 15.00 FEET

Surface Area: 2.94 ACRES

Capacity: 22.05 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			S2NENE	25	37N	30E	PHILLIPS

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

73328-00

73329-00